

**Professorial Talk : EU Law in The Global Text**

**The Single European Market and Its Impacts on Non-EU Business  
Professor John Fairhurst**

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# EU LAW IN THE GLOBAL CONTEXT

*The Single European Market and its  
Impact on Non-EU Businesses*

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## OUTLINE

- A. FREE MOVEMENT OF GOODS
  - Customs Duties
  - Discriminatory internal taxation
  - Quantitative restrictions and measures having an equivalent effect
- B. APPLICATION TO NON-EU BUSINESSES
- C. OPTIONS FOR NON-EU BUSINESSES

## A. FREE MOVEMENT OF GOODS

- 1. Customs duties
- 2. Discriminatory internal taxation
- 3. Quantitative restrictions and measures having an equivalent effect

## 1. CUSTOMS DUTIES AND EQUIVALENT CHARGES

ART 28(1) TFEU - GENERAL PROVISION

ART 30 TFEU:

"CUSTOMS DUTIES ON IMPORTS AND EXPORTS AND CHARGES HAVING EQUIVALENT EFFECT, SHALL BE PROHIBITED BETWEEN MEMBER STATES. THIS PROHIBITION SHALL ALSO APPLY TO CUSTOMS DUTIES OF A FISCAL NATURE".

## SCOPE OF TERM GOODS

CASE 7/68 Commission v Italy

- PRODUCTS WHICH CAN BE VALUED IN MONEY AND WHICH ARE CAPABLE ... OF FORMING THE SUBJECT OF COMMERCIAL TRANSACTIONS.

CASE C-97/98 Jagerskiold

- GRANTING OF FISHING RIGHTS AND THE ISSUING OF FISHING PERMITS, IS NOT CONCERNED WITH GOODS, BUT SERVICES.

## THE *EFFECT* NOT THE *PURPOSE*

CASE 7/68 Commission v Italy

- ITALIAN EXPORT TAX ON, FOR EXAMPLE, ARTISTIC GOODS.
- THE REASON FOR THE IMPOSITION OF THE TAX (I.E. PROTECTION OF THE NATIONAL ARTISTIC HERITAGE) IS IRRELEVANT.

## CHARGES HAVING AN EQUIVALENT EFFECT

CASE 24/68 Commission v Italy

- ITALIAN LEVY ON EXPORTED GOODS TO FINANCE THE COLLECTING OF STATISTICAL DATA RELATING TO TRADE PATTERNS.
- COURT OF JUSTICE STATED THAT ANY FINANCIAL CHARGE, HOWEVER SMALL, WHICH IS LEVIED ON GOODS BY REASON OF THE FACT THAT THEY CROSS A BORDER, CONSTITUTES A CHARGE HAVING AN EFFECT WHICH IS EQUIVALENT TO A CUSTOMS DUTY (i.e. CEE).

## PROVISION OF A SERVICE

CASE 132/82 Commission v Belgium

- A CHARGE LEVIED ON GOODS AS THEY CROSS A BORDER WILL NOT BE A CEE PROVIDED:
  - THE CHARGE IS CONSIDERATION FOR A SERVICE ACTUALLY RENDERED TO THE IMPORTER AND IS OF AN AMOUNT COMMENSURATE WITH THAT SERVICE.
  - THE CHARGE ONLY APPLIES TO CHARGES IMPOSED BY THE STATE.

## 2. DISCRIMINATORY INTERNAL TAXATION

ART 110 TFEU

- ART 110(1) TFEU - INTERNAL TAXATION ON EU GOODS MUST NOT EXCEED THAT LEVIED ON *SIMILAR* DOMESTIC GOODS
- ART 110(2) TFEU - INTERNAL TAXATION ON EU GOODS MUST NOT BE SUCH AS TO AFFORD AN INDIRECT PROTECTION TO OTHER GOODS

## THE PURPOSE OF ART 110 TFEU

CASE 171/78 Commission v Denmark

- TO ELIMINATE DISCRIMINATORY INTERNAL TAXATION

## ART 110(1) - SIMILAR PRODUCTS

CASE 168/78 Commission v France

- PRODUCTS WHICH HAVE "SIMILAR CHARACTERISTICS AND MEET THE SAME NEEDS FROM THE POINT OF VIEW OF CONSUMERS"

CASE 243/84 John Walker

- IS LIQUEUR WINE SIMILAR TO WHISKY?
- LOOK AT THE OBJECTIVE CHARACTERISTICS OF THE TWO PRODUCTS: DIFFERENT ALCOHOL CONTENTS AND MANUFACTURING METHODS

## ART 110(1) AND 110(2) - THE RELATIONSHIP

ART 110(1) - IF GOODS ARE *SIMILAR* THE TAXES HAVE TO BE EQUALISED

ART 110(2) - IF GOODS ARE NOT SIMILAR, BUT ARE IN COMPETITION WITH EACH OTHER, ANY PROTECTIVE EFFECT AFFORDED TO DOMESTIC PRODUCTS BY THE INTERNAL TAXATION SYSTEM MUST BE REMOVED

## ART 110(2) - PROTECTIVE EFFECT

CASE 170/78 Commission v UK

- BEER IN THE UK WAS TAXED AT LOWER LEVELS THAN WINE (2x Alcohol; 4x Vol)
- UK WAS A MAJOR PRODUCER OF BEER, BUT IMPORTED MOST OF ITS WINE
- IS BEER *SIMILAR* TO WINE - ART 110(1)?
- IS BEER *IN COMPETITION WITH* WINE - ART 110(2)?
- IS THE TAX SYSTEM PROTECTIVE OF BEER PRODUCERS?

## ART 110(2) - PROTECTIVE EFFECT (cont.)

CASE 170/78 Commission v Italy

- ITALY INTERNAL TAX ON BANANAS 50% - INTERNAL TAX ON OTHER FRUIT 0%
- ITALY MAJOR PRODUCER OF OTHER FRUIT, BUT IMPORTED ALL BANANAS
- ARE BANANAS *SIMILAR* TO OTHER FRUIT - ART 110(1)?
- ARE BANANAS *IN COMPETITION WITH* OTHER FRUIT - ART 110(2)?
- IS THE TAX SYSTEM PROTECTIVE OF "OTHER FRUIT PRODUCERS"?

## 3. QRs AND MEQRs

QUANTITATIVE RESTRICTIONS (QRs)

AND

MEASURES HAVING AN EQUIVALENT EFFECT TO QUANTITATIVE RESTRICTIONS (MEQRs)

## INTRODUCTION

ARTICLE 34 TFEU

- QRs AND MEQRs ON IMPORTS ARE PROHIBITED

ARTICLE 35 TFEU

- QRs AND MEQRs ON EXPORTS ARE PROHIBITED

ARTICLE 36 TFEU

- PROVIDES DEFENCES TO ARTS 34 AND 35 TFEU (E.G. ON GROUNDS OF PUBLIC HEALTH)

## STATE MEASURES

CASE 249/81 COMMISSION v IRELAND

- "BUY IRISH" CAMPAIGN BY THE IRISH GOODS COUNCIL
- MEMBERS OF THE COUNCIL APPOINTED BY THE IRISH GOVERNMENT
- IRISH GOVERNMENT FUNDED THE COUNCIL BY PROPORTION OF 6:1
- COURT OF JUSTICE HELD THAT THE COUNCIL IS IN REALITY PART OF THE GOVERNMENT, AND THEREFORE PART OF THE STATE.

## QRs

CASE 2/73 GEDDO

- A QR IS A MEASURE WHICH AMOUNTS TO A TOTAL OR PARTIAL RESTRICTION OF IMPORTS, EXPORTS OR GOODS IN TRANSIT
- IT THEREFORE INCLUDES BANS AND QUOTAS

## MEQRs

CASE 8/74 *DASSONVILLE*

- ALL TRADING RULES ENACTED BY MEMBER STATES WHICH ARE CAPABLE OF HINDERING, DIRECTLY OR INDIRECTLY, ACTUALLY OR POTENTIALLY, TRADE WITHIN THE UNION, IS AN MEQR
- THIS IS A VERY BROAD DEFINITION AND WILL CATCH MANY MEASURES WHICH ARE NOT A QR WITHIN THE STRICT *GEDDO* DEFINITION

## DISTINCTLY APPLICABLE MEASURES

A MEASURE WHICH ONLY APPLIES TO FOREIGN GOODS

A SIMPLE READING OF THE LEGAL PROVISION WILL INDICATE THIS TO BE THE CASE

SO, FOR EXAMPLE, A FRENCH BAN ON BRITISH BEEF IS ONLY APPLIED TO FOREIGN BEEF (NOT TO DOMESTIC BEEF) AND THEREFORE IS A DISTINCTLY APPLICABLE MEASURE

## IMPORT AND EXPORT RESTRICTIONS

CASES 51-54/71 *INTERNATIONAL FRUIT COMPANY*

- IMPORT AND EXPORT LICENCES

CASE 154/85 *COMMISSION v ITALY*

- LENGTHY IMPORT PROCEDURES FOR CARS

CASE 4/75 *REWE-ZENTRALFINANZ*

- INSPECTIONS ON IMPORTED APPLES

CASE C-265/95 *COMMISSION v FRANCE*

- WILL ALSO APPLY TO OMISSIONS

## PROMOTION OF DOMESTIC GOODS

CASE 249/81 *COMMISSION v IRELAND*

- IRISH GOODS COUNCIL "BUY IRISH" CAMPAIGN
- THE CAMPAIGN FAILED

CASE 12/74 *COMMISSION v GERMANY*

- COURT OF JUSTICE HELD THAT ORIGIN-MARKING MAY BE PERMISSIBLE

CASE 113/80 *COMMISSION v IRELAND*

- COURT OF JUSTICE HELD THAT IT WAS IMPERMISSIBLE FOR IMPORTED SOUVENIRS TO BE REQUIRED TO BE STAMPED WITH COUNTRY OF ORIGIN OR WORD "FOREIGN"

## INDISTINCTLY APPLICABLE MEASURES

A MEASURE WHICH APPLIES TO BOTH DOMESTIC AND FOREIGN GOODS, BUT IN PRACTICE HAS A HARSHER IMPACT ON FOREIGN GOODS

SEE ARTICLE 3, DIRECTIVE 70/50/EEC

CASE 8/74 *DASSONVILLE*

- ALL TRADING RULES ... WHICH ARE CAPABLE OF HINDERING, DIRECTLY OR INDIRECTLY, ACTUALLY OR POTENTIALLY, TRADE WITHIN THE UNION ARE MEQRs

## CASE 120/78 *CASSIS*

IMPORTING *CASSIS* (AN ALCOHOLIC LIQUEUR) INTO GERMANY FROM FRANCE

GERMAN LAW REQUIRED LIQUEURS TO HAVE MINIMUM 25% ALCOHOL CONTENT, WHEREAS FRENCH *CASSIS* HAD A LOWER ALCOHOL CONTENT

THE GERMAN LAW THEREFORE, IN PRACTICE, PREVENTED THE FRENCH *CASSIS* FROM BEING SOLD IN GERMANY, UNLESS THE PRODUCT WAS CHANGED

## THE RULE OF MUTUAL RECOGNITION

THIS IS REFERRED TO AS THE FIRST *CASSIS* PRINCIPLE

AT PARA 14, THE COURT OF JUSTICE STATED:

"THERE IS NO VALID REASON WHY, PROVIDED THAT THEY HAVE BEEN LAWFULLY PRODUCED AND MARKETING IN ONE OF THE MEMBER STATES, ALCOHOLIC BEVERAGES SHOULD NOT BE INTRODUCED INTO ANY OTHER MEMBER STATE"

## ORIGIN-MARKING

CASE 207/83 *COMMISSION v UK*

- UK REQUIRED ALL GOODS SOLD IN MARKETS TO BE MARKED WITH THEIR COUNTRY OF ORIGIN.

THE COURT OF JUSTICE STATED:

"THE PURPOSE OF INDICATIONS OF ORIGIN OR ORIGIN-MARKING IS TO ENABLE CONSUMERS TO DISTINGUISH BETWEEN DOMESTIC AND IMPORTED GOODS AND THIS ENABLES THEM TO ASSERT ANY PREJUDICES ... AGAINST FOREIGN GOODS"

## ART 36 TFEU - DEFENCES

PUBLIC MORALITY, POLICY OR SECURITY

PROTECTION OF HEALTH AND LIFE OF HUMANS, ANIMALS AND PLANTS

PROTECTION OF NATIONAL TREASURES

PROTECTION OF INDUSTRIAL AND COMMERCIAL PROPERTY

NOTE: DEFENCES MUST NOT "CONSTITUTE A MEANS OF ARBITRARY DISCRIMINATION OR DISGUISED RESTRICTION ON TRADE"

## INDISTINCTLY APPLICABLE MEASURES

THE RULE OF REASON - CASE 120/78 *CASSIS*

OBSTACLES MAY BE RECOGNISED AS NECESSARY TO SATISFY *MANDATORY REQUIREMENTS* RELATING IN PARTICULAR TO EFFECTIVENESS OF FISCAL SUPERVISION, PROTECTION OF PUBLIC HEALTH, FAIRNESS OF COMMERCIAL TRANSACTIONS AND DEFENCE OF THE CONSUMER

## THE RULE OF REASON - ITS APPLICATION

CASE 788/79 *GILLI AND ANDRES* and CASE 113/80 *COMMISSION v IRELAND*

- THE RULE OF REASON ONLY APPLIES TO INDISTINCTLY APPLICABLE MEASURES

## OTHER MANDATORY REQUIREMENTS

CASE 302/86 *COMMISSION v DENMARK*

- ENVIRONMENTAL PROTECTION

CASES 60 AND 61/84 *CINETHEQUE SA*

- ENCOURAGE CREATION OF CINEMATOGRAPHIC WORKS

CASE 145/87 *TORFAEN BOROUGH COUNCIL*

- ECONOMIC AND SOCIAL POLICY OBJECTIVES

## B. APPLICATION TO NON-EU BUSINESSES

1. Articles 28(2) and 29 TFEU
2. Case 193/85 *Co-Frutta*
3. Customs tariffs
  - Free trade agreements
  - Preferential duty regime for ACP States
  - Generalised System of Preferences (GSP)
4. Other entry formalities

## 1. ARTICLES 28(2) AND 29 TFEU

ART 28(2) TFEU:

- ART 30 TFEU AND ARTS 34-36 TFEU APPLY TO PRODUCTS WHICH COME FROM NON-EU COUNTRIES AND WHICH ARE IN FREE CIRCULATION IN THE EU

ART 29 TFEU STIPULATES WHEN GOODS ARE IN FREE CIRCULATION:

"PRODUCTS COMING FROM A THIRD COUNTRY SHALL BE CONSIDERED TO BE IN FREE CIRCULATION IN A MEMBER STATE IF THE IMPORT FORMALITIES HAVE BEEN COMPLIED WITH AND ANY CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT WHICH ARE PAYABLE HAVE BEEN LEVIED IN THAT MEMBER STATE ...".

## 2. CASE 193/85 CO-FRUTTA

CASE 193/85 *CO-FRUTTA*:

- THE COURT OF JUSTICE ACCEPTED THAT THE COMMON CUSTOMS TARIFF AND THE COMMON COMMERCIAL POLICY WERE INTENDED TO ENSURE A UNIFORM TREATMENT OF GOODS WHICH HAD BEEN IMPORTED FROM THIRD COUNTRIES, AND THE FACILITATION OF THE FREE MOVEMENT OF SUCH GOODS ONCE THEY HAD BEEN IMPORTED INTO ONE OF THE MEMBER STATES.
- ART 110 TFEU (DISCRIMINATORY INTERNAL TAXATION) WOULD THEREFORE APPLY TO ALL GOODS IN FREE CIRCULATION, WHETHER EU OR NON-EU.

## 3. CUSTOMS TARIFFS

COMMON CUSTOMS TARIFFS FOR NON-EU GOODS

FREE TRADE AGREEMENTS

- E.G. EGYPT-EU ASSOCIATION AGREEMENT – DUTY FREE ACCESS TO THE EU

PREFERENTIAL DUTY REGIME FOR AFRICAN, CARIBBEAN AND PACIFIC (ACP) STATES

- ECONOMIC PARTNERSHIP AGREEMENTS (COMPREHENSIVE OR INTERIM)
- GENERALISED SYSTEM OF PREFERENCES (GSP)

GENERALISED SYSTEM OF PREFERENCES (GSP)

## 4. OTHER ENTRY FORMALITIES

EXAMPLES

- DOCUMENTATION
- INSPECTIONS
- QUOTAS OR PROHIBITIONS

EU "EXPORT HELPDESK" WEBSITE

[http://exporthelp.europa.eu/index\\_en.html](http://exporthelp.europa.eu/index_en.html)

## C. OPTIONS FOR NON-EU BUSINESSES

1. Options for a non-EU business which is seeking to trade with the EU
2. Establishing a business within the EU

## 1. OPTIONS FOR NON-EU BUSINESSES WHICH ARE SEEKING TO TRADE WITH THE EU

The options available to a non-EU business which seeks to trade with the EU:

- Import goods into the EU
- Import goods into a non-EU country which: (i) has a free trade agreement with the EU, (ii) is an ACP State, or (iii) is covered by the GSP (the goods can then be imported into the EU under the terms of the free trade agreement, the relevant ACP agreement or the GSP)
- Establish a business within the EU (joint or sole venture)
- Establish a business within a non-EU country which: (i) has a free trade agreement with the EU; (ii) is an ACP State; or (iii) is covered by the GSP

## 2. ESTABLISHING A BUSINESS WITHIN THE EU

A non-EU business which seeks to establish a business within the EU will need to invest in the chosen Member State (i.e. Foreign Direct Investment)

A non-EU business may seek to establish a business within the EU to manufacture and distribute its goods (rather than manufacturing its goods in its home country and importing such goods into the EU) for the reasons set out overleaf.

## REASONS FOR ESTABLISHING A BUSINESS WITHIN THE EU

To circumvent EU trade barriers (e.g. to get behind tariff and quota walls)

To capitalise on additional resources (e.g. technologies, skilled workforce, materials)

To decrease costs (e.g. labour, materials, transportation and financing)

To capitalise on incentives (e.g. a particular Member State may offer tax-breaks or financial incentives)

## REASONS FOR ESTABLISHING A BUSINESS WITHIN THE EU (cont.)

To capitalise on lower rates of taxation (e.g. corporate taxation may be lower, and/or there may be more advantageous taxation write-offs for capital investment)

To provide a direct service to international customers

## REASONS FOR ESTABLISHING A BUSINESS WITHIN THE EU (cont.)

A non-EU business should select the most advantageous Member State within which to establish their business. In making this decision it should be noted that the laws throughout the EU have not been fully harmonised:

- E.g. Company law is predominantly regulated by national law because currently there is no common EU standard
- E.g. Direct and internal taxation (individual and business) is regulated by national law and therefore different rates apply in each of the 27 Member States

## QUESTIONS